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## OFFICE OF PUBLIC INSTRUCTION

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Linda McCulloch  
Superintendent

February 28, 2006

Jacquelyn C. Jackson, Ed.D.  
Director, Student Achievement and School Accountability Programs  
Office of Elementary and Secondary Education  
U.S. Department of Education  
400 Maryland Ave SW., Room 3C156, FB-6  
Washington, DC 20202-6132

Dear Dr. Jackson:

The Montana Office of Public Instruction (OPI) appreciates this opportunity to submit comments in response to the Notice of Proposed Rulemaking (NPRM) concerning the "Proposed 2 Percent Rule" as published in the *Federal Register* on December 15, 2005.

The OPI is pleased with the additional flexibility that would be available to states when assessing students with disabilities. In general, we support the approach of the Department in allowing states flexibility to implement an assessment system that will assess students using modified achievement standards.

Our comments address the specific areas of the proposed regulations that will enhance implementation of the regulation and improve the validity of the process used for AYP calculation.

Our comments on specific sections of the regulations follow.

### **§200.1 State responsibilities for developing challenging academic standards.**

#### **Comment:**

The proposed revisions to §200.1 provide an important option for states when conducting assessments of students who, because of their disability, have significant difficulty achieving grade-level proficiency, even with the best instruction. However, implementation of the provisions of the regulation will be cumbersome and expensive. While we support the provisions of §200.1, we believe that states should also have an option to substitute a calculation procedure for AYP instead of having to establish modified achievement standards, develop an assessment instrument to measure the modified achievement standards, and differentiate those children eligible for assessment using the modified achievement test. Requiring states and school districts to follow the labor-intensive procedures in §200.1 would seem like a costly and unnecessary burden to address the foundation of the "2 Percent Rule."

The foundation of the "2 Percent Rule" justifies the development of modified achievement standards based on a presumption that 2 percent of students have significant difficulty achieving grade-level proficiency, even with the best instruction. The NPRM correctly points out that 2

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percent of students respond to high-quality instruction, including special education-related services, such that the student is not likely to achieve grade-level proficiency within the school year covered by the student's individualized education program (IEP).

Because research supports this presumption, it is appropriate that the final rules include an option for states to perform a substitute calculation for the performance of students with disabilities. The substitute calculation, for purposes of AYP determination, would allow not proficient scores of students with disabilities to be counted as proficient up to a maximum of 2 percent of the tested enrollment.

#### **Rationale:**

A formula-driven solution, that would credit districts by counting as proficient 2 percent of the tested students whose score would have otherwise been counted as not proficient on the state or districtwide assessment when calculating AYP, has a number of key advantages for students, districts, and the state. The advantages are as follows:

- Children could avoid being categorized. While the proposed regulation attempts to insulate children from the adverse consequences of being identified as a student with significant academic difficulty unable to achieve grade-level proficiency, the very act of this categorization process is likely to produce stigma and lower expectations.
- The IEP teams could avoid the contentious task of determining which students are in need of a modified assessment that measures modified achievement standards. The NPRM repeatedly refers to the challenge this is likely to pose and asks states to develop guidelines that clearly differentiate those students who are eligible for the modified assessment. While some guidance is provided in the NPRM on how to make this differentiation, the reality is that it is going to be very difficult to develop these guidelines and sometimes contentious for IEP teams to implement those guidelines.

Research supports that 2 percent of students may be in need of a modified assessment. The NPRM recognizes the difficulty in making this determination when it proposed a strict ceiling of 2 percent as the maximum number of students whose score could be counted as proficient when taking the modified assessment. If 2 percent is the goal of federal regulations and of state guidelines for the selection of students eligible for the modified assessment, it would seem appropriate that 2 percent simply be used in a formula for AYP calculation.

- Adding further to the complexity of the AYP calculation process could be avoided. A third assessment instrument with its requirements for separate reporting, managing the complexities of the interaction of the 1 percent and 2 percent ceilings, and providing the necessary professional development to support teachers when determining which of three possible assessments the student with disabilities is eligible for (alternate, modified, or regular) adds complexity to a system that is already hard for the public to understand. If the public is unable to understand the system, it is less likely that the public will trust the system.
- Costs associated with test development and administration could instead be spent on instruction. While the NPRM singled out three states that have apparently developed relatively low-cost assessments, it is reasonable to believe that this is not universally true.

In an effort to meet the Department's requirements for technical adequacy, we found that the costs of an alternate assessment are substantial. Montana spends approximately \$250,000 per year for its alternate assessment. Last year, 355 students took the alternate assessment for an average per student cost totaling over \$700. The \$700 covers the costs of the instrument and scoring. It does not include the ongoing costs for training staff, staff time in test administration, or time spent in reporting results. The per student cost for developing assessment instruments for small states is substantial. Funds can be better spent on addressing students' instructional needs through professional development activities, reducing class size by increasing teaching staff, and the implementation of additional educational supports for at-risk students.

#### **§200.13(6) Adequate Yearly Progress in General.**

##### **Comment:**

Proposed revisions to §200.13 would prohibit a state from granting an exception to an LEA to exceed the 2 percent cap on the number of students that could be counted as proficient or advanced when taking a test based on modified academic achievement standards. This limitation has a significant and adverse effect on many of Montana's smallest districts. States should be allowed to grant an automatic exception for those districts whose tested enrollment is less than 100 to allow up to two students with disabilities who scored not proficient to be counted as proficient when calculating AYP. Automatic exceptions should not be counted against a state's limit on the number of students scoring proficient on assessments measuring modified academic achievement standards.

##### **Rationale:**

Montana has 208 school districts with an enrollment between zero and 99 and, of these, 145 school districts have an enrollment below 50. Under the proposed regulations, the 145 districts with an enrollment below 50 would be unable to count even a single student as scoring proficient on an assessment measuring modified achievement standards. These figures reflect total district enrollment and not tested enrollment. Thus, the number of districts affected by proposed rule §200.13 is even larger. It would seem that the inability to grant an exception in this circumstance is fundamentally unfair to small districts. There is every reason to believe that small school districts also enroll students who, because of their disability, have significant difficulty achieving grade-level proficiency, even with the best instruction. All districts should be able to have no less than two students whose scores could be counted as proficient on an assessment measuring modified achievement standards.

#### **§200.200 Making Adequate Yearly Progress.**

Proposed revisions to §200.200 allow states, when calculating AYP for the subgroup of students with disabilities, to include, for a period of up to two years, the scores of students who were previously identified as eligible under IDEA, but who have exited from special education services. The OPI supports this provision and also supports the provision that would not require states to include those students in the students with disabilities subgroup in determining if the number of students with disabilities is sufficient to yield statistically reliable information.

Unfortunately, this regulation does not address students who recently began receiving special education services. The §200.200 should be rewritten to allow states the flexibility to not include for up to two years the school assessment results for students with disabilities who have been determined to be eligible for special education for the first time. This standard should apply when publicly reporting results and when calculating the AYP for the disaggregated subgroup of students with disabilities.

### **Rationale:**

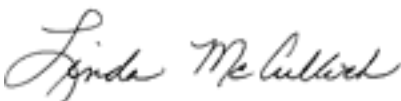
A comprehensive analysis of the impact on assessments of academic progress of students with disabilities entering and leaving special education services was conducted by the National Center on Educational Outcomes (NCEO), Office of Special Education Programs (OSEP), U.S. Department of Education-funded center. The results of *Technical Report Number 27* show that the highest achieving special education students left special education to return to general education, and that they were replaced by the lowest performing regular education students who had been referred to and found eligible for special education. The result was a substantial increase in the performance gap over time between regular education and special education students across grades. The study, conducted by one of our nation's foremost leaders in the study of educational outcomes, clearly demonstrates that it is both the students entering, as well as those leaving special education, that depress the scores of students in this subgroup.

It is vital that the nation's system of accountability for students with disabilities be based on sound scientific principles. As stated in *Technical Report Number 27*, educators, parents, policymakers, and citizens want and need to know the extent to which all students, including students with disabilities, are profiting from their educational programs. The research on this subject is clear. Roughly 20 percent of the special education population in a given year experiences a status change from the prior year with approximately 10 percent of the students being new to special education and 10 percent of the students leaving special education services. "Furthermore, results indicate that students leaving special education outperformed those entering special education by as much as .75 standard deviation units. The group moving from regular education into special education often had a lower mean achievement level than the group of students who remained in special education." (*Technical Report Number 27*)

Valid assessments of academic performance of the disaggregated subgroup of students with disabilities cannot be made without adjusting for those students newly receiving special education services. Clearly, students benefit from special education services. It is inappropriate to include in the AYP calculation students who have yet to have the opportunity to benefit from high-quality special education services.

Please contact Bob Runkel, Administrator, Division of Special Education, at [brunkel@mt.gov](mailto:brunkel@mt.gov) if you have questions regarding these comments.

Sincerely,

A handwritten signature in cursive script that reads "Linda McCulloch".

Linda McCulloch  
Montana Superintendent of Public Instruction